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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

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In the Matter of:

Amendment of Section 73.202(b)  
Table of Allotments, FM Broadcast  
Stations (Rosendale, New York)

MM Docket No. 93-17  
RM-8170

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To: The Commission

APPLICATION FOR REVIEW

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## SUMMARY

The State University of New York ("SUNY") urges the Commission to reverse the Policy and Rules Division decision not to modify WFNP's license to specify operation on a newly allotted FM Channel sought by SUNY. The staff refused to modify the SUNY license based solely on its mistaken interpretation that a reserved band license may not be modified to a nonreserved band channel, unless the channel is first reserved for noncommercial use.

The staff misapplied Section 1.420(g) of the Rules. The plain language of the rule provides for the license modification requested by SUNY. The staff's introduction of a reserved/nonreserved "gloss" to the rule was plain error. Moreover, the staff's application of the rule conflicts with the goal of the Commission in adopting Section 1.420(g), which was to encourage facility upgrades. SUNY's license modification would result in the upgrade of two stations currently locked in an unsuitable time-share arrangement.

The staff misapplied its own precedent. Shortly after adoption of Section 1.420(g), the staff allowed a noncommercial station to move from a reserved channel to a nonreserved channel without reservation of the new allotment. That case cannot be distinguished from SUNY's case on the issue of the operation of Section 1.420(g).

The staff also erred by interpreting its regulations and policies to nullify the effective intent of the rule and by ignoring the public interest benefits of the SUNY license modification proposal. Finally, the staff committed prejudicial procedural error in the rulemaking by failing to alert SUNY and the public that the proposal could not be accomplished if the new channel was not reserved for noncommercial educational use.

Commission rules and precedent compel grant of SUNY's requested modification of WFNP's license to Channel 273A. The staff decision therefore must be reversed and the staff directed to modify SUNY's license for Station WFNP to operate on Channel 273A.

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**APPLICATION FOR REVIEW**

State University of New York ("SUNY"), by its counsel, applies for Commission review of the *Memorandum Opinion and Order* ("MO&O") issued by the Policy and Rules Division, Mass Media Bureau, denying reconsideration of the *Report and Order* ("R&O") of the Allocations Branch in MM Docket No. 93-17.<sup>1</sup> In the R&O, the staff declined to apply Section 1.420(g) of the Rules to modify the license of SUNY's station WFNP, Rosendale, New York, to specify operation on a newly allotted FM Channel that had been sought by SUNY to permit WFNP to operate as a full-time station. The staff decision should be reversed because the staff adopted an unwarranted, after-the-fact interpretation of Section 1.420(g) that is inconsistent with the plain language of the regulation and with precedent. The staff action deprives SUNY and the public of the very advantages envisioned by the Commission in adopting the rule. SUNY seeks

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<sup>1</sup> Report and Order in MM Docket No. 93-17, 10 FCC Rcd 11471 (1995) ("R&O"). recon. denied, DA 96-376 (March 28, 1996) ("MO&O"). Copies of the staff decisions are appended in Attachment A. Public Notice of the MO&O was issued on March 28, 1996. Accordingly, this Application for Review is timely filed.

review and reversal of the staff decision; the staff should be directed to modify SUNY's license for WFNP to specify operation on Channel 273A.

### **Introduction**

SUNY's noncommercial educational station WFNP at Rosendale currently shares FM Channel 204 with noncommercial educational Station WRHV, Poughkeepsie, New York, licensed to WMHT Educational Telecommunications. The share time arrangement arose out of a settlement of a comparative hearing proceeding between the parties. Although SUNY and WRHV have cooperated in sharing the frequency, they have experienced the inevitable consequences of such an arrangement -- listener confusion over varying formats and the inability of either party to maximize its service to the public. Consequently, SUNY investigated options to permit both parties to operate full-time stations. Due to congestion in the reserved FM band and potential Channel 6 interference, SUNY chose to move its operation into the nonreserved band.

SUNY's Petition for Rulemaking sought the allocation of Channels 273A and 255A at Rosendale and, pursuant to the unambiguous language of Section 1.420(g) of the Rules, the modification of the WFNP license to specify operation on Channel 273A, which of the two frequencies best fit SUNY's needs. The staff proposed the allotment of Channel 273A at Rosendale and the requested modification of SUNY's license. Notice of Proposed Rule Making, DA93-99 (released February 17, 1993) ("NPRM"). The staff noted that WFNP is a noncommercial educational station and that SUNY had not requested that Channel 273A be reserved for noncommercial use. It therefore requested SUNY to clarify whether it wanted the channel reserved and instructed SUNY as to the showing such a reservation would require.

Significantly, the staff did not state or imply in any way that, if SUNY chose to have the allocation nonreserved, the staff believed itself incapable of modifying the WFNP license as SUNY requested and the staff proposed.

In its Comments, SUNY clarified that it requested Channel 273A to be allotted as a nonreserved channel. However, SUNY also stated that it would operate the station noncommercially, which, of course, is completely permissible. Several other parties filed counterproposals for the use of Channel 273A. However, in the R&O, the staff determined that none of these efforts were acceptable for consideration. Thus, the stage was set for the routine grant of SUNY's allocation/modification proposal, as there were (1) no other timely filed expressions of interest and (2) even if there had been such an expression of interest, there was an additional frequency (Channel 255A) that was also available. See Section 1.420(g)(1) and (2).

To SUNY's shock and dismay, it won the battle but lost the war. Inexplicably, the R&O allotted Channel 273A as requested, but determined that the WFNP license could not be modified based entirely on the staff's view, previously unshared with SUNY and the public, that a noncommercial station may not take advantage of Section 1.420(g) unless the new allotment is reserved for noncommercial use. SUNY sought reconsideration of the R&O because the staff's action conflicts with Section 1.420(g), with the public interest goals underlying the rule, and with precedent. On reconsideration, the staff continued to adhere to its earlier view and refused to modify WFNP's license.

Review and reversal of the staff decision are necessary because the decision is directly at odds with the clear language of Section 1.420(g), which has no reserved/unreserved "gloss." It is fundamentally at odds with the public interest goals that formed the basis of the Commission's

adoption of the rule. It is squarely inconsistent with precedent. It will likely deprive SUNY and the public of the benefits that motivated SUNY to initiate and prosecute this proceeding at considerable expense and, at best, result in substantial delay in effectuating any new service on the frequency. Any one of these factors is a sufficient legal basis for review of the staff's action. Taken together, they form a compelling case.

### **Question Presented For Review**

Did the staff err in concluding that the FM station license modification procedures of Section 1.420(g) of the Rules cannot be applied where a noncommercial licensee seeks a nonreserved channel allotment, notwithstanding the licensee's intention to continue to operate on a noncommercial basis?

### **Argument**

#### **I. The Staff's Refusal to Modify SUNY'S License Conflicts With Commission Regulation**

The language of Section 1.420(g) should have governed the staff's decision. That language is clear and unambiguous. It permits "an FM station" to initiate the process and makes no distinction whatever between noncommercial and commercial stations, or between reserved and nonreserved allotments. When it adopted the rule in 1984, the Commission can be presumed to have understood these distinctions and, had it desired to do so, it could have made them part of the rule. It did not do so.

The staff has no authority to add a new substantive "gloss" to the rule. It has to follow the rule as written. This is a fundamental principle of administrative law that the Commission has upheld again just days ago. See Bascomb Memorial Broadcasting Foundation, FCC 96-143 (released April 17, 1996) at ¶ 8-9 (the terms of a rule that is clear and unequivocal on its face is



conclusive, especially where adhering to its plain meaning does not produce a result obviously in violation of the intent of the rule; moreover the Commission is obviously aware of distinctions in terms when clear and unequivocal rules are adopted).<sup>2/</sup>

## **II. The Staff's Decision Conflicts With the Goals of the Commission in Adopting the Rule**

In the Report and Order in MM Docket No. 83-1148, FCC 84-358 (released July 26, 1984), the Commission adopted Section 1.420(g) in order to "continue its policy of encouraging broadcast licensees to upgrade their facilities." Id. at ¶4. The FCC believed that "FM and television station licensees should be encouraged to upgrade their facilities in order to improve service to their audiences." id. at ¶6, and that the rule it adopted reflected sound administrative policy. SUNY's proposal comports with the intent of Section 1.420(g): it would result in upgraded facilities and improvement in service to WFNP's audience. Indeed, this case furthers the Commission's goals more than most--it would result in the upgrade and improvement of service at two stations (both WFNP and WRHV, which now share time, would become full-time stations).

In the R&O, at ¶2, the Staff suggested that, in the 1984 Report and Order, the Commission stated that "the procedure [of Section 1.420(g)] does not apply to stations seeking to switch from a noncommercial band channel to one within the commercial band, finding the issue

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<sup>2/</sup> See also United States v. Larionoff, 431 U.S. 864, 872 (1977) (administrative agency's interpretation of its own regulations is not controlling where inconsistent with the language and purposes of the regulation); Capital Network System, Inc. v. F.C.C., 28 F.3d 201 (D.C. Cir. 1994) (administrative interpretation is not controlling if inconsistent with the regulation) (citing United States v. Larionoff, 431 U.S. at 872); see also Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991) (no deference is warranted to an agency's interpretation where interpretation is inconsistent with the wording of the regulation).

to be outside the scope of the proceeding.” This view was repeated without further explanation, and no reasoned analysis, in the MO&O, at ¶6. With all due respect to the staff’s reading of the 1984 Report and Order, the document “states” no such thing concerning the rule’s applicability. Buried in ¶12 of that decision is an off-hand reference--clearly dictum--to an unarticulated and now-unknown “suggestion” of a now-defunct law firm concerning a switch from a reserved channel to a commercial channel, which “suggestion” was deemed outside the scope of the proceeding. There is no way at this time to know what that “suggestion” was, whether it applied only to a particular adjudicative situation for which some special advantage was sought in the rulemaking, or whether it urged some unusual twist that departed from what the Commission generally sought to accomplish.

What is clear is that the rule the Commission adopted, despite that reference, did not limit its application to commercial stations moving from one nonreserved channel to another. If it had adopted such a limit as now suggested by the staff, even proceedings involving the move from a reserved Ed-FM channel (FM Channels 201-220) to a reserved channel in the FM Channel 221-300 band, with appropriate Channel 6 interference or foreign allotment preclusion showings, would be prohibited, contrary to the staff’s own current position and consistent practice. To suggest that the Commission’s dictum in the 1984 Report and Order controls any of these situations, especially in view of the fact that the staff has in fact previously applied the rule to the contrary in a situation analogous to SUNY’s (see below), is clear error.

### **III. The Staff’s Refusal to Modify SUNY’s License Conflicts with Precedent**

In ¶3 of the R&O, the staff concedes that the Policy and Rules Division in FM Broadcast Station in Sioux Falls, SD, 51 Fed. Reg. 4169 (February 3, 1986), did exactly what SUNY urges

it to do here--it applied Section 1.420(g), a little more than a year after its adoption, to a noncommercial station seeking to move from a reserved channel to a nonreserved channel without seeking a reservation for the new allotment.

The Staff tries to explain how the Sioux Falls case differs from Rosendale, first suggesting that it was trying to correct an "error" in earlier proceedings. See, ¶3 of R&O; ¶8 of MO&O. SUNY submits that the significance of the correction of an earlier "error" merely went to the issue of regulatory fairness (not unlike the similar issue here; see n.4 below), not to any limitation on the applicability of Section 1.420(g).<sup>27</sup> The Notice of Proposed Rulemaking and the Report and Order in the Sioux Falls case provided the staff with a straightforward opportunity to clarify the applicability of Section 1.420(g). Yet, Sioux Falls did not state anywhere that, absent that earlier mistake, the allotment/modification could not have taken place. The staff also did not state that it was waiving or bending Section 1.420(g) in any respect, or that the decision should not be relied on in the future by noncommercial stations seeking to invoke Section 1.420(g).

Indeed, what's remarkable about Sioux Falls is that the staff seemed entirely unconcerned by the petitioner's candid explanation that, while its present plans did not contemplate the provision of any service other than noncommercial educational programming, it wanted the option, should circumstances change, of being able to change to commercial service if by so doing "some advantage might accrue to the [petitioner]." Id. at ¶3. If, as the staff now

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<sup>27</sup> To find otherwise would allow the Commission to ignore precedent established by actions correcting staff error -- a result at odds with basic concepts of administrative law. See Petroleum Communications, Inc. v. F.C.C., 22 F.3d 1164, 1172 (D.C. Cir. 1988) (an agency must treat similarly situated parties similarly)

asserts, it intended its decision to be a narrowly-prescribed cure for a noncommercial station that had been mistakenly deprived of a useful reserved frequency. it would have been expected to limit the station's future service to noncommercial programming. Instead, the staff simply applied the rule as written. Given the public interest benefits of SUNY's proposal, the same result must hold.<sup>4/</sup>

Second, in comparing the situations, the staff failed to acknowledge the upgrade of SUNY's sharetime partner station WRHV to full time status at the existing site of WFNP (the stations now share transmission facilities). Thus, even if WFNP were to become a commercial station, there would still be the same level of noncommercial service to WFNP's entire service area. Instead, the staff attempts to contrast the "abundance" of noncommercial educational service in Sioux Falls with the lesser level of such service in Rosendale. This is an inappropriate comparison between a major metropolitan area and a very small suburban community in a metropolitan area with ample noncommercial service.<sup>5/</sup> In addition, the level of noncommercial

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<sup>4/</sup> Even assuming that the Sioux Falls decision was based on staff error, the FCC staff could be deemed to have erred just as much in the instant case by proposing to allot Channel 273A and modify SUNY's license without informing that the proponent, SUNY (or the general public) in the NPRM that a reserved band station cannot modify its license to a commercial channel despite the clear language of the Rule

<sup>5/</sup> Sioux Falls is the largest city in the State of South Dakota with a 1990 census population of 100,814 persons and an MSA of 154,300 persons. Sioux Falls has at least 19 broadcast stations (3 TV and 16 radio) licensed to that community. Rosendale is a Census Designated Place (CDP) in Ulster County, New York with a 1990 census population of 1,284 persons. At present, SUNY's station WFNP is the only broadcast station, commercial or noncommercial, licensed to Rosendale and operates only part-time. Moreover, the overall level of noncommercial service to Rosendale, New York is comparable to that in Sioux Falls, which is apparent from the record in this proceeding. Attachment 2 contains a "white area" mapping study from Sacred Heart University's counterproposal to the NPRM in this proceeding. This map demonstrates that Rosendale receives a signal from at least three other noncommercial stations, WAMK(FM), Kingston, New York; WHVP(FM), Hudson, New York; and WVKR-FM,

service originating in Sioux Falls or Rosendale is wholly irrelevant to the public interest justifications for modifying SUNY's license for Station WFNP. To suggest otherwise would consistently result in allowing applicants serving large cities with ample service to modify licenses to upgrade service while preventing applicants in small communities with lesser service from much more necessary service upgrades. There is nothing in Section 1.420(g) that suggests any such distinction. The rule applies.

Finally, the staff attempts to distinguish the Sioux Falls case based on inadequate public notice. The staff suggests that, in Sioux Falls, the NPRM requested comment on reserving the channel for noncommercial educational use, while in Rosendale, the NPRM did not disclose that Station WFNP could be modified to a nonreserved allotment. This is nonsense. The NPRM for Channel 273A at Rosendale clearly gave commenters notice that WFNP might be modified to a nonreserved allotment.<sup>6/</sup>

In sum, there is no reasoned basis for distinguishing the instant case from Sioux Falls. The staff should have followed prior precedent and modified SUNY's license for Station WFNP to Channel 273A.<sup>7/</sup>

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Poughkeepsie, New York, obviously in addition to the part-time service from WRHV(FM), Poughkeepsie, New York (which would be upgraded to full time service by virtue of the WFNP license modification).

<sup>6/</sup> The NPRM stated: "It is requested that petitioner clarify whether it seeks to have Channel 273A allotted as a reserved or nonreserved channel. If it does wish to have Channel 273A reserved for noncommercial use, petitioner is requested to provide an appropriate showing that the reserved portion of the band is unavailable due to the proximity of a TV Channel 6 station and/or use of the channels by Canadian stations "

<sup>7/</sup> In the R&O, the staff indicated that it could not "modify Station WFNP's license from a commercial to a noncommercial channel without the commercial channel's reservation for such use," citing Siloam Springs, Arkansas, 2 FCC Rcd 7485 (1987), aff'd 4 FCC Rcd 4920 (Pol. & Rules Div. 1989) and Bulls Gap, Tennessee, MM Docket 94-117, released September 22, 1995

#### **IV. The Staff Erred in Interpreting Its Regulation to Nullify Its Effective Intent and in Ignoring the Public Interest Benefits of the SUNY License Modification**

The staff rejected SUNY's argument that modifying the license for Station WFNP would comport with the intent of Section 1.420(g) and benefit the public interest, stating that the license modification would remove the "only allotment reserved for noncommercial educational use at Rosendale." On its face, this is an incorrect statement, as there is no reserved allotment at Rosendale now, only a licensed, part-time station (WFNP). In the instant situation, however, the staff's action thwarts the effective intent of the rule by precluding upgrades of two noncommercial stations providing service to the area, including Rosendale, thus, limiting the provision of additional local noncommercial service to the community.<sup>8/</sup> SUNY's license modification would resolve an unsatisfactory noncommercial time-sharing arrangement by giving each licensee its own full-time channel. Both time-sharing licensees endorsed this

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(DA 95-1981). Neither Siloam Springs nor Bulls Gap stands for that proposition and neither applies here. Bulls Gap dealt with the merits of a counterproposal to reserve a commercial channel for noncommercial use, not a modification of a license to a nonreserved band channel. Siloam Springs concerned the elimination (without replacement) of a reserved channel in a community presumably without other noncommercial radio service. In this case, there is no reserved channel elimination. Part-time station WRHV would continue to operate (on an upgraded fulltime basis) on reserved Channel 204. Moreover, Rosendale receives ample noncommercial service, as shown p. 8 supra and on Attachment 2. To the extent that Bulls Gap and Siloam Springs are intended to stand for the proposition that the commercial band may not be used by stations choosing to operate noncommercially without a "reservation", the decisions are clearly erroneous and contravene Section 1.420(g).

<sup>8/</sup> Indeed, while the Commission has plenary authority under Section 307(b) of the Communications Act to distribute licenses to "make a fair, efficient, and equitable distribution of radio service to communities," the Commission must also acknowledge the Congressional mandate to "complement, assist and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States," 47 U.S.C. Section 396(b)(7) (1996), and to "ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies." 47 U.S.C. Section 396(b)(9) (1996).

approach. Constrained by its time-share arrangement, SUNY currently provides only part-time (20% of a calendar year) noncommercial educational service to Rosendale. Congestion in the reserved band precludes use of another reserved band allotment to accomplish the divorce of the time-share arrangement. The only way to institute full-time noncommercial educational service in Rosendale is through use of the requested allotment.

Yet, ample Commission precedent, as noted by the staff in NPRM (see n.7, supra), demonstrates that a commercial channel will not be reserved absent a potential Channel 6 interference problem or preclusion by foreign allotments. Rather than undertake that engineering burden, and in the absence of any statement in the NPRM or Section 1.420(g) that suggested SUNY had to request a reservation to obtain a license modification, SUNY chose to use an unreserved commercial allotment for noncommercial educational purposes.<sup>9</sup> In full accordance with Section 1.420(g) and prior Commission precedent, SUNY sought to do this by modifying its license to a new frequency. Whether the channel is actually "reserved" for noncommercial educational use is--or should be--immaterial.<sup>10</sup> The staff's rejection of SUNY's approach disserves the FCC's goals by preserving a part-time local noncommercial educational service at the expense of a full-time local noncommercial educational service, albeit on a nonreserved channel.

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<sup>9</sup> The Commission may take official note that many AM radio licensees, as well as FM radio licensees on commercial channels, operate their stations on a noncommercial educational basis (upon an appropriate showing of legal qualification to do so) with the full blessing of the FCC staff, despite lack of any "reserved band" obligation to do so.

<sup>10</sup> If the Commission would modify SUNY's license for Station WFNP(FM) to Channel 273A, SUNY would accept a condition on its license restricting the station's use to noncommercial educational purposes, thereby resolving the staff's concern about removing the only local noncommercial educational service.

Ironically and illogically, the FCC staff would permit SUNY to convert WFNP to a commercial station by either "building" or "buying," by obtaining the construction permit to build a new station on Channel 273A at Rosendale, or by purchasing the station from an eventual commercial operator on Channel 273A at Rosendale, and then abandoning its noncommercial frequency to WRHV, all without any of the concerns that have caused it to balk here. But the staff will not permit SUNY to modify its license to a nonreserved allotment -- a simple procedure available to every licensee operating on a nonreserved allotment. Even more ironically, under the staff's approach, if SUNY were already operating on a nonreserved channel (even on a noncommercial educational basis), SUNY would be permitted to modify its license using Section 1.420(g).

SUNY showed that Channel 255A could have been added to Rosendale to satisfy commercial interests which did not materialize in the rulemaking but, to no great surprise, showed up in droves when the staff opened the 273A window.<sup>11/</sup> Unfortunately, requiring SUNY to prosecute its application for Channel 273A against these commercial applicants will substantially delay, if not deny, these benefits. Even if SUNY eventually prevails in a hearing, after the Commission adopts new comparative criteria, that victory will be a long time coming and will be at great expense to SUNY, the other applicants and to the Commission. Moreover, given the likely comparative commercial criteria that will eventually apply to the channel, SUNY's prospects as a noncommercial applicant will not be good. The result will be that, when

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<sup>11/</sup> Based on SUNY's review of FCC records, there are 10 applicants for Channel 273A, including 7 commercial and 2 noncommercial applicants (not including SUNY's application) for Channel 273A. These applicants could, without prejudice, prosecute their applications on Channel 255A.



all is said and done, after initiating the rulemaking and prosecuting its case, SUNY, WMHT and the public will be deprived of the advantages that justified the allotment in the first place.

#### **V. The Staff Committed Prejudicial Procedural Error**

This application for review rests on simple notions of fair play and the rule of law as written. In the NPRM, the staff noted that SUNY had not sought to have Channel 273A reserved and went to great lengths to explain what SUNY would have to show if it wanted a reserved allotment. Despite all that, the staff never explained to SUNY or the general public that, absent a choice to have the allotment reserved, it interpreted Section 1.420(g) as precluding the very result SUNY sought and, not coincidentally, the staff proposed in the NPRM. Perhaps this was an oversight -- a “mistake” on the part of the staff (compare Sioux Falls). Or perhaps the staff changed its position on the issue between the issuance of the NPRM and the R&O. Under either of these scenarios, the result is not only unlawful but manifestly unfair and unjust, and should be corrected by modifying SUNY's license to Channel 273A.<sup>12/</sup>

#### **Conclusion**

For all these reasons, the Commission should review and reverse its staff's decision in the R&O. It should modify SUNY's license for WFNP to specify operation on the newly allotted channel.

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<sup>12/</sup> As noted above, this result would not prejudice the other applicants for Channel 273A. These other applicants submitted their applications despite notice that SUNY sought stay of the window and intended to seek reconsideration. They can also be accommodated on Channel 255A, which SUNY showed to be available for use at Rosendale.

Respectfully submitted.

**STATE UNIVERSITY OF NEW YORK**

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April 23, 1996

## **ATTACHMENT A**

REPORT AND ORDER  
(Proceeding Terminated)Before the  
Federal Communications Commission  
Washington, D.C. 20554

Adopted: October 3, 1995;

Released: October 20, 1995

By the Chief, Allocations Branch

MM Docket No. 93-1<sup>1</sup>

In the Matter of

Amendment of Section 73.202(b) RM-8170  
Table of Allotments.  
FM Broadcast Stations.  
(Rosendale, New York)

Neither of the counterproposals is acceptable for consideration in this proceeding. Natole requests that Channel 255A be allotted to West Hurley, New York, as its first local aural service, instead of to Rosendale. Natole failed to serve a copy of its pleading on the petitioner as required by 1.420(a) of the Commission's Rules. However, in light of our action herein, we will consider Natole's request as a new petition for rule making and issue a separate Notice of Proposed Rule Making.

RSB is the permittee of Station WQQQ, Channel 277A, Sharon, Connecticut and SHU is the licensee of noncommercial educational FM Station WSHU, Fairfield, Connecticut. They request that Station WQQQ's construction permit be modified to specify Channel 273A and that its community of license be changed from Sharon to Washington, New York. In addition, they request that Channel 277A remain allotted to Sharon but that it be reserved for noncommercial educational use. SHU states its intention to apply for Channel 277A at Sharon. This counterproposal is not acceptable for consideration since Section 1.420(i) only permits the modification of a station's authorization to specify a new community of license where the new allotment is mutually exclusive with the licensee's or permittee's present assignment. Here, RSB seeks modification to a non-adjacent channel and thus there is no mutual exclusivity. In its reply comments, RSB/SHU argues that its counterproposal should have been accepted since the proposed channel allotments comply with the Commission's spacing requirements. They contend that even if non-technical problems exist which ultimately would lead to the denial of the counterproposal, these problems are not a bar to the acceptance of the counterproposal. RSB also claims that the Commission should have accepted its counterproposal and sought comment on the allotment of Channel 273A to Sharon and the modification of Station WQQQ's construction permit accordingly. RSB acknowledges that the proposed allotment of Channel 273A to Sharon was not explicitly stated in the counterproposal but argues that it was implicit in its proposal. It now specifically states that it wants to be modified to Channel 273A even if the station must remain a Sharon facility.

We disagree with SHU/RSB. Counterproposals must be technically and procedurally correct when filed and may not be amended at a later date. See *Arlington, Texas, et al.*, 8 FCC Rcd 4281 (1993), *Hondo, Texas, et al.*, 7 FCC Rcd 7610 (1992), *Flora, Mississippi, et al.*, 7 FCC Rcd 5477 (1992). Contrary to SHU/RSB's apparent belief, the failure to state specifically their alternate proposal to allot Channel 273A to Sharon and modify Station WQQQ's construction permit accordingly renders the counterproposal both technically and procedurally defective.

At the request of the State University of New York ("petitioner"), licensee of noncommercial educational Station WENP, Channel 204A, Rosendale, New York, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 947 (1993), proposing the allotment of Channel 273A to Rosendale and the modification of Station WENP's license to specify the alternate Class A channel. Comments were filed by the petitioner and counterproposals were filed by Raymond A. Natole ("Natole") and jointly by Sacred Heart University, Inc. and Radio South Burlington ("SHU/RSB").<sup>1</sup> Reply comments were filed by the petitioner, WMHT Educational Telecommunications ("WMHT"), SHU/RSB<sup>2</sup> and Bambi Broadcasting, Inc. ("Bambi").<sup>3, 4</sup> For the reason discussed below,

further, we find that SHU/RSB has not shown any reason why the Commission should have, on its own motion, proposed the allotment of Channel 273A to Sharon and the modification of Station WQQQ's license accordingly. RSB, in its reply comments, states that the change of channel is necessary to allow it to operate with 6 kW of power. However, the counterproposal clearly states that Channel 277A, which is Station WQQQ's presently authorized channel, can be operated with 6 kW at the site of an existing tower and provide all of Sharon with the required 70 dBu city-grade service. If the sole purpose of the counterproposal were to provide Sharon with its first local noncommercial educational service, then it would have been necessary to submit a proposal requesting only the allotment of Channel 273A to Sharon and no mention of Channel 277A, at either Sharon or Washington, would have been necessary. Therefore, we do not agree that the allotment of Channel 273A to Sharon and the modification of Station WQQQ's construction permit to specify the alternate Class A channel to be either implicit in or a logical outgrowth of RSB/SHU's counterproposal. Further, even if we were to agree that the allotment of Channel 273A to Sharon were properly before the Commission, we note that RSB/SHU has failed to include a technical showing that the channel can be allotted in compliance with the Commission's minimum distance separation requirements or, at a minimum, to provide proposed coordinates for such an allotment. Therefore, the counterproposal fails to meet the requirement that a petitioner provide a technical showing demonstrating compliance with the Commission's rules. See *Provincetown, Massachusetts, et al.*, 8 FCC Rcd 19 (1993), *Big Spring, Texas, et al.*, 7 FCC Rcd 4834 (1992).

SHU/RSB's reply comments relate to the acceptability and public interest benefits of its counterproposal. As stated in footnote 1 *supra*, the counterproposal is not acceptable for consideration and thus the potential public interest benefits need not be discussed.

Bambi's reply comments consist of an expression of interest in applying for Channel 273A, if allotted to Washington. This pleading is moot in light of the dismissal of SHU/RSB's counterproposal.

After the record closed the following unauthorized pleadings were received: "Motion for Leave to File Supplemental Reply Comments" and "Supplemental Reply Comments" filed by SHU/RSB; "Petition for Leave to File Natole's Comments on SUNY Response to SHU/RSB Supplemental Reply Comments" filed by Natole; "Response to SHU/RSB Supplemental Reply Comments" filed by SUNY; and "Motion for Leave to Respond to Natole's Comments on SUNY Response to SHU/RSB Sup-

we will not modify the noncommercial educational license of station WFNP to operate on Channel 273A as a commercial station. Instead, we will allot Channel 273A as a commercial channel and open a filing window.

### DISCUSSION

2. In reviewing our earlier *Notice*, we discovered that we had proposed to modify petitioner's license for Station WFNP to specify operation on Channel 273A as a commercial station.<sup>5</sup> As stated in the *Notice*, noncommercial educational stations generally operate within the reserved portion of the FM band (Channels 201-220). Exceptions have been made in cases where channels in the noncommercial band are not available because of foreign allocations (Canadian or Mexican) or potential interference to TV Channel 6 operations. Here, there is no channel within the noncommercial band for use by Station WFNP because of the community's proximity to other existing domestic licensees, not because of the existence of either Canadian stations or TV-6 interference problems. Therefore, we find that, consistent with Commission precedent, we cannot modify Station WFNP's license from a noncommercial to a commercial channel without the commercial channel's reservation for such use. See, *Siloam Springs, Arkansas*, 2 FCC Rcd 7485 (1987), *aff'd* 4 FCC Rcd 4920 (1989), *Bulls Gap, Tennessee*, MM Docket 94-117, releases September 22, 1995 (DA 95-1981). Finally, even though there is an additional equivalent channel which could be allotted to Rosendale in the even other parties had expressed an interest in applying for Channel 273A, we do not believe that we can invoke the procedure set forth in Section 1.420(g). That rule permits the modification of a station's license to specify a non-adjacent higher class channel with the availability of additional equivalent or superior class channel for use by other interested parties. However, the Commission stated in the *Report and Order* adopting the rule, that the procedure does not apply to stations seeking to switch from a noncommercial band channel to one within the commercial band, finding the issue to be outside the scope of the proceeding.<sup>6</sup>

3. We recognize that the Commission, in *Sioux Falls, South Dakota*, modified the license of Station KCFS from noncommercial educational Channel 211A to commercial Channel 261A. However, that action corrected an error on the Commission's part when it had misinterpreted the desire of Stations KCFS to provide Sioux Falls with two noncommercial educational services on Channels 211A and 215A and instead deleted the station from Channel 211A. Further, the error was not caught until an application for a new station on Channel 273A had been filed and

granted cut-off protection. The *Notice* in that proceeding advised interested parties of our error and the fact that an additional commercial channel was available to accommodate any expression of interest in a commercial channel. Moreover, in the *Report and Order* granting the modification of Station KCFS from a noncommercial channel to a non-reserved commercial channel, we also noted that Sioux Falls received local noncommercial educational service from four stations and local commercial service from five stations, thus there was no concern that we would be removing the community's sole local noncommercial educational service. Here, Station WFNP provides the community's only local noncommercial educational service and the modification of its license to a non-reserved commercial could result in the loss of the community's sole noncommercial educational service.

4. However, based on petitioner's stated intent to apply for the unreserved channel 273A at Rosendale, we will allot the channel and specify an application filing window. We believe the public interest would be served by allotting Channel 273A to Rosendale, New York, since an interest has been expressed in providing the community with its first fulltime FM service.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 4, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Rosendale, New York	273A

6. Channel 273A can be allotted to Rosendale in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.7 kilometers (2.9 miles) southeast to avoid a short-spacing to Station WUUC, Channel 273B, Rome, New York.<sup>7, 8, 9</sup> Canadian concurrence in the allotment has been received since Rosendale is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

7. The window period for filing applications for Channel 273A at Rosendale, New York will open on **December 4, 1995**, and close on **January 4, 1996**.

8. IT IS FURTHER ORDERED, That the counterproposals filed jointly by Sacred Heart University, Inc. and Radio South Burlington to modify the license of Station WOOO, Sharon, Connecticut, from Channel 277A to

plemental Comments" and to SUNY Response to SHU/RSB Supplemental Reply Comments" filed by SHU/RSB. The Commission's Rules do not contemplate the filing of pleadings beyond the comment periods set forth in the *Notice*. Moreover, we find that the additional comments do not provide information of decisional significance and therefore will not be considered.

<sup>5</sup> Petitioner filed comments reiterating its intention to apply for the channel, if allotted. In response to the *Notice*, petitioner also clarified that it does not want channel 273A reserved for noncommercial educational use even though it will continue to operate Station WFNP as a noncommercial station.

<sup>6</sup> See *Amendment of the Commission's Rules Regarding the Modification of FM and Television Station Licenses*, 56 F.R. 20

1255, 1257 (1984).

<sup>7</sup> See *Notice of Proposed Rule Making*, 50 FR 5430, June 19, 1985, *Report and Order*, 51 FR 4169, February 3, 1986.

<sup>8</sup> The coordinates for Channel 273A at Rosendale are North Latitude 41-49-14 and West Longitude 74-02-13.

<sup>9</sup> Petitioner, in its reply comments, states that it intends to apply for a construction permit at its presently authorized transmitter site, not the reference coordinates set forth in the *Notice*. The petitioner is not required to submit an application specifying the reference coordinates set forth herein. However, we expect that the application will comply with the technical requirements set forth in the Commission's Rules.

Channel 273A, reallocate Channel 273B from Sharon to Washington, New York, and reserve Channel 277A at Sharon for noncommercial educational use. ARE DISMISSED.

9. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

Before the  
Federal Communications Commission  
Washington, D.C. 20554

MM Docket No. 93-17

In the Matter of

Amendment of Section 73.202(b).

RM-8170

Table of Allotments.

FM Broadcast Stations.

(Rosendale, New York)

**MEMORANDUM OPINION AND ORDER**  
**(Proceeding Terminated)**

Adopted: March 14, 1996;

Released: March 28, 1996

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration by the State University of New York ("SUNY"), directed to the *Report and Order* in this proceeding, 10 FCC Rcd 11471 (1995). Sacred Heart University, Inc. ("Sacred Heart") and Aritaur Communications, Inc. ("Aritaur") filed Oppositions to the Petition for Reconsideration. WMHT Educational Telecommunications ("WMHT") filed a "Statement in Support of Petition for Reconsideration." SUNY filed a Reply to the Oppositions to its Petition for Reconsideration. For the reasons discussed below, we deny the Petition for Reconsideration.<sup>1</sup>

**BACKGROUND**

2. At the request of SUNY, licensee of noncommercial educational Station WENP, Channel \*204A, Rosendale, New York, the *Notice of Proposed Rule Making*, 8 FCC Rcd 947 (1993), proposed the allotment of Channel 273A to Rosendale and modification of the Station WENP license to specify operation on Channel 273A. In the *Notice*, we stated that the Station WENP license could be modified to a channel of the same class without providing an opportunity for competing expressions of interest. However, we noted that should another party express an interest in providing Rosendale with an additional local service, Channel 225A would be available for allotment. In the *Notice* we also observed that SUNY had not requested that Channel 273A be reserved for noncommercial educational use. In this regard, we stated that Commission policy generally does not permit the reservation of a commercial channel for noncommercial use except where channels in the reserved portion of the FM band (Channels 201-220) are not available due to TV Channel 6 interference or preclusion by a foreign allotment. For these reasons, we requested that SUNY provide information regarding the availability of

channels in the noncommercial educational FM band and clarify whether it seeks to have Channel 273A allotted on a commercial or noncommercial educational basis.

3. In response to the *Notice*, SUNY filed comments reiterating its intention to apply for the channel, if allotted. SUNY also stated that it does not want Channel 273A reserved for noncommercial use even though it will continue to operate Station WENP as a noncommercial educational station.

4. The *Report and Order* did not modify the noncommercial educational license of Station WENP to operate on Channel 273A. Instead, we allotted Channel 273A to Rosendale and opened a filing window. In doing so, we recognized that we had inadvertently proposed to modify a noncommercial educational FM license to an allotment in the commercial FM band. We determined that this would be contrary to Commission precedent of not assigning noncommercial educational FM stations to the commercial band in the absence of TV Channel 6 interference or preclusion by a foreign allotment.

5. In support of its Petition for Reconsideration, SUNY sets forth three arguments. First, SUNY contends that our action denying its proposed modification was inconsistent with Section 1.420(g) of our Rules which permits such a modification when there is an equivalent channel to accommodate other expressions of interest. Second, our action runs counter to the Commission policy of encouraging broadcast licensees to upgrade their facilities. Third, SUNY contends that our action was inconsistent with an earlier action in *Sioux Falls, South Dakota*, 51 FR 4169, February 3, 1986, in which we modified the license of noncommercial educational FM Station KCFS, Channel \*211A, Sioux Falls, South Dakota, to specify operation on Channel 261A without Channel 261A being reserved for a noncommercial educational service. We will consider these arguments seriatim.

**DISCUSSION**

6. Our action not modifying the license of noncommercial educational Station WENP to a channel in the commercial band was consistent with Section 1.420(g) of the Rules. In *Modification of FM and TV Licenses*, 56 RR 2d 1253 (1984), the Commission adopted the procedure which permits an FM station to modify its license through a rulemaking proceeding to a nonadjacent FM channel provided there is an equivalent channel to accommodate any expression of interest in the proposed FM channel. This procedure is now set forth in Section 1.420(g) of the Rules. In taking this action, the Commission specifically stated that a modification of a noncommercial educational FM station from the noncommercial educational band to a channel in the commercial FM band was "outside the scope" of that proceeding, 56 RR 2d at 1257. In view of that unequivocal statement by the Commission, there is no basis to suggest that our failure to implement the requested modification in this proceeding was somehow inconsistent with Section 1.420(g) of the Rules. Furthermore, in *Modification of FM and TV Licenses, supra*, the Commission did not alter the long-standing policy of assigning noncommercial educa-

<sup>1</sup> SUNY also filed an "Emergency Request for Stay of FM Application Window" and Aritaur filed an Opposition to that filing. In view of our action denying the underlying Petition for

Reconsideration, the Emergency Request for Stay of FM Application Window is now moot and will be dismissed.

tional FM stations into the commercial FM band only in situations of potential TV Channel 6 interference or preclusion by a foreign allotment. See *Comobabi, Arizona*, 47 FR 32717, July 29, 1982; *Burlington and Newport, Vermont*, 45 RR 2d 786 (1979); *Presque Isle, Maine*, 36 RR 2d 840 (1976); *Waco, Texas*, 10 FCC 2d 865 (1967); see also *Siloam Springs, Arkansas*, 2 FCC Rcd 7485 (1987), *aff'd* 4 FCC Rcd 4920 (1989); *Bulls Gap, Tennessee*, 10 FCC Rcd 10444 (1995).

7. As noted in the Petition for Reconsideration, Station WFPN currently operates on a shared-time basis with noncommercial educational FM Station WRHV, Channel \*204A, Poughkeepsie, New York. We recognize that modification of the Station WFPN license to another channel would provide a public interest benefit by enabling both stations to provide a fulltime noncommercial educational service. However, in response to the *Notice*, SUNY stated that it did not want Channel 273A reserved for noncommercial educational use. As such, there is no assurance, beyond the present intention of SUNY, that Rosendale will continue to receive a local noncommercial educational service. We emphasize that the SUNY proposal would have removed the only allotment reserved for noncommercial educational use at Rosendale. On balance, we do not see an overriding public interest benefit in modifying the Station WFPN license to a commercial allotment.

8. The determination in this case is consistent with our 1986 action in *Sioux Falls, South Dakota, supra*. In *Sioux Falls, South Dakota*, we modified the license of noncommercial educational FM Station KCFS, Channel \*211A, Sioux Falls, South Dakota, to specify operation on Channel 261A. In allotting Channel 261A to Sioux Falls, we did not reserve it for noncommercial educational use. That action is distinguishable from this case for three reasons. First, that action was undertaken to correct a Commission error in which the staff misinterpreted the desire of the licensee to retain Channel \*211A. Instead, the staff reassigned the channel to another applicant. Second, there were four noncommercial educational FM stations licensed to Sioux Falls. In contrast to Rosendale, this was abundant local noncommercial educational service. Third, the *Notice* in that proceeding noted these facts and specifically requested comment on whether Channel 261A should be reserved for noncommercial educational use. In the present proceeding, the *Notice* did not provide adequate notice to the public that the Station WFPN license could be modified to a commercial allotment or request public comment on such a proposal. Under the circumstances of this case, we continue to believe that the public interest would not be served by removing the only noncommercial educational FM allotment from Rosendale.<sup>2</sup>

9. Accordingly, IT IS ORDERED That the aforementioned Petition for Reconsideration filed by State University of New York IS DENIED.

10. IT IS FURTHER ORDERED That the aforementioned Emergency Request for Stay of FM Application Window IS DISMISSED.

11. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2180.

#### FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink  
Chief, Policy and Rules Division  
Mass Media Bureau

<sup>2</sup> We note that SUNY is one of the applicants for the Channel 273A allotment at Rosendale, New York. In the event SUNY becomes the permittee of Channel 273A, it would have the

option of operating the station as a noncommercial educational facility.



## **ATTACHMENT B**